

AMENDMENT TO H.R. 5005, AS REPORTED
OFFERED BY MR. TOM DAVIS OF VIRGINIA OR
MR. TURNER OF TEXAS

Strike subtitle F of title VII and insert the following:

1 **Subtitle F—Risk Sharing and**
2 **Indemnification**

3 **SEC. 751. RISK SHARING AND INDEMNIFICATION.**

4 (a) DEFINITIONS.—Section 4 of the Office of Federal
5 Procurement Policy Act (41 U.S.C. 403) is amended by
6 adding at the end the following new paragraphs:

7 “(16) The term ‘anti-terrorism technology and
8 services’ means any product, equipment, service or
9 device, including information technology, system integration and any other kind of services (including
10 support services) related to technology, designed, developed, modified or procured for the purpose of preventing, detecting, identifying, or otherwise deterring
11 acts of terrorism.

12 “(17) The term ‘act of terrorism,’ means the
13 calculated attack or threat of attack against persons,
14 property or infrastructure to inculcate fear, intimidate or coerce a government, the civilian population,
15 or any segment thereof, in the pursuit of political,
16 religious or ideological grounds.



1 “(18) The term ‘insurance carrier’ means any
2 corporation, association, society, order, firm, com-
3 pany, mutual, partnership, individual, aggregation of
4 individuals, or any other legal entity that provides
5 commercial property and casualty insurance. Such
6 term includes any affiliates of a commercial insur-
7 ance carrier.

8 “(19) The term ‘liability insurance’ means in-
9 surance for legal liabilities incurred by the insured
10 resulting from—

11 “(A) loss of or damage to property of oth-
12 ers;

13 “(B) ensuing loss of income or extra ex-
14 pense incurred because of loss of or damage to
15 property of others;

16 “(C) bodily injury (including death) to per-
17 sons other than the insured or its employees; or

18 “(D) loss resulting from debt or default of
19 another.

20 “(20) The term ‘homeland security procure-
21 ment’ means any procurement of anti-terrorism
22 technology and services, as determined by the head
23 of the agency, procured for the purpose of pre-
24 venting, detecting, or otherwise deterring acts of ter-
25 rorism.



1 “(21) The term ‘information technology’—

2 “(A) means any equipment or inter-
3 connected system or subsystem of equipment
4 that is used in the automatic acquisition, stor-
5 age, manipulation, management, movement,
6 control, display, switching, interchange, trans-
7 mission, or reception of data or information;

8 “(B) includes computers, ancillary equip-
9 ment, software, firmware, and similar proce-
10 dures, services (including support services), and
11 related resources; and

12 “(C) does not include any equipment that
13 is acquired by a Federal contractor incidental
14 to a Federal contract.”.

15 (b) FEDERAL RISK SHARING AND INDEMNIFICA-
16 TION.—The Office of Federal Procurement Policy Act is
17 further amended by adding at the end the following new
18 sections:

19 **“SEC. 40. FEDERAL RISK SHARING AND INDEMNIFICATION.**

20 “(a) When conducting a homeland security procure-
21 ment the head of an agency may include in a contract
22 an indemnification provision specified in subsection (e) if
23 the head of the agency determines in writing that it is
24 in the best interest of the Government to do so and deter-
25 mines that—



1 “(1) the anti-terrorism technology and services
2 are needed to protect critical infrastructure services
3 or facilities;

4 “(2) the anti-terrorism technology and services
5 would be effective in facilitating the defense against
6 acts of terrorism; and

7 “(3) the supplier of the anti-terrorism tech-
8 nology is unable to secure insurance coverage ade-
9 quate to make the anti-terrorism technology and
10 services available to the Government.

11 “(b) The head of the agency may exercise the author-
12 ity in this section only if authorized by the Director of
13 the Office of Management and Budget to do so.

14 “(c) In order to be eligible for an indemnification pro-
15 vision specified in this section, any entity that provides
16 anti-terrorism technology and services to an agency identi-
17 fied in this Act shall obtain liability insurance of such
18 types and in such amounts, to the maximum extent prac-
19 ticable as determined by the agency, to satisfy otherwise
20 compensable third party claims resulting from an act of
21 terrorism when anti-terrorism technologies and services
22 have been deployed in defense against acts of terrorism.

23 “(d) An indemnification provision included in a con-
24 tract under the authority of this section shall be without



1 regard to other provisions of law relating to the making,
2 performance, amendment or modification of contracts.

3 “(e)(1) The indemnification provision to be included
4 in a contract under the authority of this section shall in-
5 demnify, in whole or in part, the contractor for liability,
6 including reasonable expenses of litigation and settlement,
7 that is not covered by the insurance required under sub-
8 section (c), for:

9 “(A) Claims by third persons, including employ-
10 ees of the contractor, for death, personal injury, or
11 loss of, damage to, or loss of use of property, or eco-
12 nomic losses resulting from an act of terrorism;

13 “(B) Loss of, damage to, or loss of use of prop-
14 erty of the Government; and

15 “(C) Claims arising (i) from indemnification
16 agreements between the contractor and a subcon-
17 tractor or subcontractors, or (ii) from such arrange-
18 ments and further indemnification arrangements be-
19 tween subcontractors at any tier, provided that all
20 such arrangements were entered into pursuant to
21 the terms of this section.

22 “(2) Liabilities arising out of the contractor’s willful
23 misconduct or lack of good faith shall not be entitled to
24 indemnification under the authority of this section.



1 “(f) An indemnification provision included in a con-
2 tract under the authority of this section shall be nego-
3 tiated and signed by the agency contracting officer and
4 an authorized representative of the contractor and ap-
5 proved by the head of the agency prior to the commence-
6 ment of performance of the contract.

7 “(g) The authority conferred by this section shall be
8 limited to the following agencies:

9 “(1) The Department of Homeland Security;

10 “(2) The Department of Agriculture;

11 “(3) The Department of Commerce;

12 “(4) The Department of Defense;

13 “(5) The Department of Energy;

14 “(6) The Department of Health and Human
15 Services;

16 “(7) The Department of the Interior;

17 “(8) The Department of Justice;

18 “(9) The Department of State;

19 “(10) The Department of the Treasury;

20 “(11) The Department of Transportation;

21 “(12) The Federal Emergency Management
22 Agency;

23 “(13) The Federal Reserve System;

24 “(14) The General Services Administration;



1 “(15) The National Aeronautics and Space Ad-
2 ministration;

3 “(16) The Tennessee Valley Authority;

4 “(17) The U.S. Postal Service;

5 “(18) The Central Intelligence Agency;

6 “(19) The Architect of the Capitol; and

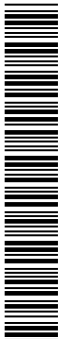
7 “(20) Any other agency designated by the Sec-
8 retary of Homeland Security that engages in home-
9 land security contracting activities.

10 “(h) If any suit or action is filed or any claim is made
11 against the contractor for any losses to third parties aris-
12 ing out of an act of terrorism when its anti-terrorism tech-
13 nologies and services have been deployed such that the
14 cost and expense of the losses may be indemnified by the
15 United States under this section, the contractor shall—

16 “(1) immediately notify the Secretary and
17 promptly furnish copies of all pertinent papers re-
18 ceived;

19 “(2) authorize United States Government rep-
20 resentatives to collaborate with counsel for the con-
21 tractor’s insurance carrier in settling or defending
22 the claim when the amount of the liability claimed
23 may exceed the amount of insurance coverage; and

24 “(3) authorize United States Government rep-
25 resentatives to settle or defend the claim and to rep-



1 resent the contractor in or to take charge of any liti-
2 gation, if required by the United States Government,
3 when the liability is not insured.

4 The contractor may, at its own expense, be associated with
5 the United States Government representatives in any such
6 claim or litigation.”.

7 (c) STATE AND LOCAL RISK SHARING AND INDEM-
8 NIFICATION.—(1) The Secretary may, upon the applica-
9 tion of a State or local government, provide for indem-
10 nification of contractors who provide anti-terrorism tech-
11 nologies and services to State or local governments if the
12 Secretary determines in writing that—

13 (A) it is in the best interest of the Government
14 to do so;

15 (B) the State or local government is unable to
16 provide the required indemnification; and

17 (C) the anti-terrorism technology and services
18 are needed to protect critical infrastructure services
19 or facilities, would be effective in facilitating the de-
20 fense against acts of terrorism, and would not be
21 reasonably available absent indemnification.

22 (2) The Secretary may exercise the authority in this
23 subsection only if authorized by the Director of the Office
24 of Management and Budget to do so.



1 (3) In order to be eligible for indemnification, any
2 entity that provides anti-terrorism technology and services
3 to a State or local government shall obtain liability insur-
4 ance of such types and in such amounts to the maximum
5 extent practicable, as determined by the Secretary, to sat-
6 isfy otherwise compensable third party claims resulting
7 from an act of terrorism when anti-terrorism technologies
8 and services have been deployed in defense against acts
9 of terrorism.

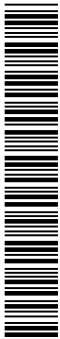
10 (4) The indemnification provided under the authority
11 of this subsection shall indemnify, in whole or in part, the
12 contractor for liability, including reasonable expenses of
13 litigation and settlement, that is not covered by the insur-
14 ance required under paragraph (3) for—

15 (A) claims by third persons, including employ-
16 ees of the contractor, for death, personal injury, or
17 loss of, damage to, or loss of use of property, or eco-
18 nomic losses resulting from an act of terrorism;

19 (B) loss of, damage to, or loss of use of prop-
20 erty of the Government; and

21 (C) claims arising—

22 (i) from indemnification agreements be-
23 tween the contractor and a subcontractor or
24 subcontractors; or



1 (ii) from such arrangements and further
2 indemnification arrangements between sub-
3 contractors at any tier, provided that all such
4 arrangements were entered into pursuant to the
5 terms of this subsection.

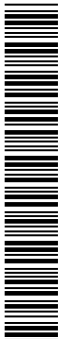
6 Liabilities arising out of the contractor's willful mis-
7 conduct or lack of good faith shall not be entitled to in-
8 demnification under the authority of this subsection.

9 (5) If any suit or action is filed or any claim is made
10 against the contractor for any losses to third parties aris-
11 ing out of an act of terrorism when its anti-terrorism tech-
12 nologies and services have been deployed such that the
13 cost and expense of the losses may be indemnified by the
14 United States under this subsection, the contractor
15 shall—

16 (A) immediately notify the Secretary and
17 promptly furnish copies of all pertinent papers re-
18 ceived;

19 (B) authorize United States Government rep-
20 resentatives to collaborate with counsel for the con-
21 tractor's insurance carrier in settling or defending
22 the claim when the amount of the liability claimed
23 may exceed the amount of insurance coverage; and

24 (C) authorize United States Government rep-
25 resentatives to settle or defend the claim and to rep-



1 resent the contractor in or to take charge of any liti-
2 gation, if required by the United States Government,
3 when the liability is not insured.

4 The contractor may, at its own expense, be associated with
5 the United States Government representatives in any such
6 claim or litigation.

7 (6) In this subsection, the definitions in paragraphs
8 (16) through (21) of section 4 of the Office of Federal
9 Procurement Policy Act shall apply.

10 (c) IMPLEMENTING REGULATIONS.—Not later than
11 120 days after the date of the enactment of this Act, the
12 Federal Acquisition Regulation shall be amended to en-
13 sure consistency between the Federal Acquisition Regula-
14 tion and this section.

